RECEIVED
NOV 25 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT FOR THE UNITED STATES
OCTOBER TERM, 1980

NO. 80-5778

JOSEPH WILSON, JR.

PETITIONER

Vs.

STATE OF GEORGIA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF GEORGIA

BRUCE S. HARVEY
HARVEY AND BROWN
P.O. BOX 906
CLAYTON, GEORGIA 30525
PHONE: (404) 782-4575

COUNSEL FOR PETITIONER

I N D E X

	Page
OPINION BELOW.	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED. . .	2-6
STATEMENT OF THE CASE.	6-8
REASONS FOR GRANTING THE WRIT.	8

1. Petitioner's conviction and sentence to death for murder and for possession of a deadly weapon during commission of a felony constitutes double jeopardy in violation of the Fifth Amendment to the United States Constitution..... 8-15

2. Petitioner's conviction and sentence to death for murder while in the commission of kidnapping with bodily harm, where the asportation is a part of the commission of the crime of murder and the only bodily harm is the murder itself, violates due process of law as guaranteed by the Eight and Fourteenth Amendments to the United States Constitution. 15-17

3. Petitioner was denied due process and protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution by the prosecutors continual comments upon Petitioner's failure to produce certain evidence..... 17,18

4. Trial Court's instructions improperly place the burden of proof on the issue of intent upon the Petitioner rather than the State in violation of the Due Process Clause of the Fourteenth Amendment. 18-21

5. The Georgia Supreme Court erred in making a determination of immaterality under Brady (infra) as to a conviction record of one of the State's witnesses, thereby denying Petitioner of his due process rights of equal protection, of his right to a fair and impartial trial, and his right to confront witnesses 21-23

APPENDIX:

1. Opinion and Judgment of the Supreme Court of Georgia . . . . . .App. A

2. Order Extending Time to File Petition for Writ of Certiorari . . . . . .App. B

CITATIONS

Page

Atkins v. Hopper
239 Ga. 330, 216 S.E. 2d 89 (1975). 13

Bailey v. State,
146 Ga. App. 774, 247 S.E. 2d 588(1978) 15,16

Blockburger v. United States
284 U.S. 299(1932). 9,12

Brady v. Maryland
373 U.S. 83(1963) 7,22

Brown v. Ohio
432 U.S. 161 (1977) 9,13,14

Brown v. State
132 Ga. App. 399,208 S.E. 2d 183(1974). 15

Brown v. State
150 Ga. App. 831, 258 S.E. 2d 641(1979) 17

Chandle v. State
230 Ga. 574, 198 S.E. 2d 289(1973). 19

Craighead v. State
126 Ga. App. 300, 190 S.E. 2d 606(1973) 15

Delk v. State
135 Ga. 312, 69 S.E. 541(1910). 19

Gannaway v. State
142 Ga. App. 87, 235 S.E. 2d 392(1977). 17

Giles v. Maryland
386 U.S. 74. 22

Godfrey v. Georgia
446 U.S. ___ 100 S.Ct. 1759(1980) 16,17

Gore v. United States
357 U.S. 386(1958) 13

Gregg v. Georgia
428 U.S. 153(1976) 16,17

Griffin v. California
380 U.S. 609(1965) 17

Guerrero v. Beto
384 F 2d 886 (5th Cir.1968). 22

Harris v. Oklahoma
433 U.S. 682(1977) 14

Hill v. State
244 Ga. 86, 259 S.E. 2d 41(1979) 21

In Re Ferguson
489 F 2d 1234(9th Cir.1971) 22

CITATIONS

	Page
Jackson v. State 143 Ga. App. 406,238 S.E. 2d 752(1977).	11
Knox v. State 112 Ga. 373,37 S.E. 419(1900)	18
Mullaney v. Wilbur 421 U.S. 684	20
Moon v. State 68 Ga. 687(1882).	19
Oglesby v. State 243 Ga. 690,256 S.E. 2d 371(1979).	12
Ogletree v. State 209 Ga. 413, 73 S.E. 73 S.E. 2d 201(1952). . . .	19
Patterson v. New York 432 U.S. 197	20
Patterson v. State 239 Ga. 409, 238 S.E. 2d 2(1977)	19,20
Potts v. State 241 Ga. 67,243 S.E. 2d 510(1978)	11,12
Powell v. Wiman 287 F 2d 27595th Cir.1961)	22
Pryor v. State 238 Ga. 698,234 S.E. 2d 918(1977).	11
Roberts v. State 228 Ga. 298,185 S.E. 2d 385(1971).	10
Sandstrom v. Montana 441 U.S. ___ 19 S.Ct. ___(1979)	20,21
Shirley v. State 245 Ga. 616,266 S.E. 2d 218(1980).	17
Simpson v. United States 435 U.S. 682(1977)	13,14
Spain v. State 243 Ga. 15, 252 S.E. 2d 436(1979).	20
Spence v. State 233 Ga. 527 212 S.E. 2d 357(1975).	11
State v. Estevez 232 Ga. 316, 206 S.E. 2d 475(1974)	11
Stephens v. Hopper 241 Ga. 596,247 S.E. 2d 92(1978)	12

CITATIONS

	Page
Thomas v. State 240 Ga. 454, 241 S.e. 2d 204(1976).	20
U.S. v. Keogh 391 F 2d 138(2nd Cir.1968)	22
Whitehead v. State 144 Ga.App. 836,242 S.E. 2d 754(1978)	11
William v. Dutton 400 F 2d 797(5th Cir.1968).	22
Woods v. State 233 Ga. 495,212 S.E. 2d 322(1975)	13

IN THE SUPREME COURT FOR THE UNITED STATES
OCTOBER TERM, 1980

NO._____

JOSEPH WILSON, JR.

PETITIONER

Vs.

STATE OF GEORGIA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioner, Joseph Wilson, Jr., respectively prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered in this proceeding on June 10, 1980.

OPINION BELOW

The opinion of the Supreme Court of Georgia is published at Wilson v. State, 243 Ga. 62, _____S.E. 2d_____(1980), and a copy is attached hereto as Appendix A.

JURISDICTION

The judgement of the Supreme Court of Georgia was entered on June 10, 1980, affirming petitioner's conviction of murder, kidnapping with bodily injury, possession of a firearm in the commission of a crime and his sentence of death. A timely petition for rehearing was denied on June 24, 1980. An Order extending time to file petition for writ of certiorari was granted September 10, 1980, a copy of which is attached as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Does Petitioner's conviction and sentence to death for murder and for possession of a deadly weapon during commission of a felony constitute double jeopardy in violation of the Fifth Amendment to the United States Constitution?

Does Petitioner's conviction and sentence to death for murder while in the commission of kidnapping with bodily harm, where the asportation is a part of the commission of the crime of murder and the only bodily harm is the murder itself, violate due process of law as guaranteed by the Eight and Fourteenth Amendments to the United States Constitution?

Was petitioner denied due process and protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution by the prosecutors continual comments upon Petitioner's failure to produce certain evidence?

Did trial court's instructions to the jury improperly place the burden of proof on the issue of intent upon the Petitioner rather than the State in violation of the Due Process Clause of the Fourteenth Amendment?

Did the failure of the State to provide Petitioner with exculpatory material violate his rights to due process of law under the Fifth?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

The Constitutional and statutory provisions are as follows:

United States Constitution, Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws.

Georgia Constitution, 2-115 (Art. I, Sec. I) Par. XV.

No person shall be put in jeopardy of life or liberty more than once for the same offense, save on his, or her own motion for a new trial after conviction, or in case of mistrial.

Ga. Code Ann. 26-505

An accused may be convicted of a crime included in a crime charged in the indictment, information, or accusation. A crime is so included when:

(a) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged, or

(b) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

Ga. Code Ann. 26-506

(a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if (1) one crime is included in the other, or (2) the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

(b) If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided in subsection (c).

(c) When two or more crimes are charged as required by subsection (b), the court in the interest of justice may order that one or more of such charges be tried separately.

Ga. Code Ann. 26-507

(a) A prosecution is barred if the accused was formerly prosecuted for the same crime, based upon the same material facts if such former prosecution
(1) resulted in either a conviction or an acquittal; or
(2) was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court.
(b) A prosecution is barred if the accused was formerly prosecuted for a different crime, or for the same crime based upon different facts, if such former prosecution
(1) resulted in either a conviction or an acquittal, and the subsequent prosecution is for a crime of which the accused could have been convicted on the former prosecution; or was for a crime with which the accused should have been charged on the former prosecution (unless the court ordered a separate trial of such charge); or was for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the crime was not consummated when the former trial began; or
(2) was terminated improperly, and the subsequent prosecution is for a crime of which the accused could have been convicted if the former prosecution had not been terminated improperly.
(c) A prosecution is barred if the accused was formerly prosecuted in a District Court of the United States for a crime which is within the concurrent jurisdiction of this State if such former prosecution resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the crime was not consummated when the former trial began.
(d) A prosecution is not barred within the meaning of this section(1) if the former prosecution was before a court which lacked jurisdiction over the accused or the crime; or(2) if subsequent proceedings resulted in the invalidation, setting aside, reversing, or vacating of the conviction, unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict.
(e) Termination under any of the following circumstances is not improper:
(1) The accused consents to the termination or waives, by motion to dismiss or other affirmative action, his right to object to the termination.
(2) The trial court finds that the termination is necessary because(a) it is physically impossible to proceed with the trial; or(b) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to the defendant; or (c) the jury is unable to agree upon a verdict; or (d) false statements of a juror on voir dire prevent a fair trial.

Ga. Code Ann. 26-9908a

Any person who shall have on his person a firearm or a knife having a blade of three or more inches in length during the commission of, or the attempt to commit, any crime against or involving the person of another, the unlawful entry into a building or vehicle or a theft from a building or theft of a vehicle and which crime is a felony shall be guilty of a felony and, upon conviction thereof, shall be punished by confinement and

labor in the penitentiary for a period of five years, such sentence to run consecutively to any other sentence which the person has received. Upon the second or subsequent conviction of a person under this section, such person shall be punished by confinement and labor in the penitentiary for a period of 10 years. Notwithstanding any other provision of law to the contrary, the sentence of any person imposed for violating the provisions of this section a second or subsequent time shall not be suspended by the court and probationary sentence imposed in lieu thereof.
Notwithstanding any prior court decision to the contrary, any crime committed in violation of this section shall be considered a separate offense.

Ga. Code Ann. 26-1101(b)

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Ga. Code Ann. 26-1302

A person commits aggravated assault when he assaults (a) with intent to murder, to rape,or to rob, or (b) with a deadly weapon. A person convicted of aggravated assault shall be punished by imprisonment for not less than one nor more than 10 years. A person who knowingly commits aggravated assault upon a peace officer while such peace officer is engaged in or on account of the performance of his official duties shall upon conviction be punished by imprisonment for not less than five nor more than 20 years.

Ga. Code Ann. 26-1311(a)

(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

Ga. Code Ann. 27-2534.1(b)(2)

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

Ga. Code Ann. 38-1804

A witness may be impeached by evidence as to his general bad character. The impeaching witness should be first asked as to his knowledge of the general character of the witness, and next as to what that character is, and lastly he may be asked if, from that character, he would believe him on his oath. The witness may be sustained by similar proof of character. The particular transactions, or the opinions of single individuals, shall not be inquired of on either side, except upon cross-examination in seeking for the extent and foundation of the witness' knowledge.

STATEMENT OF THE CASE

Appellant was tried and convicted of murder and kidnapping, and possession of deadly weapon in the commission of a felony, in Forsyth County, Georgia on August 16, 1979, (T 1249-1253 and 1275-1276), and was thereafter sentenced to death. The statutory basis for imposition of the death penalty, as found by the jury, was murder committed while in the commission of "kidnapping the person of George A. Knox, resulting in bodily injuries to said person". Ga. Code Ann. 27-2534.1(b)(2), (R32) (T 1317).

Appellant was denied a motion for retrial before the Superior Court of Forsyth County on October 29, 1979. and thereafter appealed to the Georgia Supreme Court.

The Georgia Supreme Court affirmed the conviction on June 10, 1980, and denied a motion for a rehearing on June 24, 1980.

The evidence presented at trial in both the guilt or innocence stage and in the death penalty stage tended to show that Appellant arrived at the home of Patty Johnson (T 637) with a shotgun on the evening of February 23, 1979. Thereafter he made statements to the deceased in the presence of three witnesses (one being Patty Johnson) to the effect "you set me up" or "you put the heat on me". (T 641,766-768,810). Two of the witnesses then left. (T 641,769,811), leaving Patty Johnson, the deceased and Appellant, (T 641,769,811).

Appellant then instructed the deceased to go with him and evidently walked him out of the house at gun point,(T 642,769). Later that night Appellant told Patty Johnson in a telephone

conversation that the Deceased had been "taken care of", and to get rid of the deceased's jacket. (T 648-649).

On the morning of February 24, 1979, Frances Lane of Forsyth County found the deceased's corpse and reported this fact to the Forsyth County Sheriff's Office. (T 577,587-588).

In the ensuing autopsy it was determined that the deceased had been killed by a twelve gauge shotgun, and that he probably had been alive the previous day. (T 428-429) (S,4,A,B and C)(T 431,728-729).

Through examination of the deceased's license and payroll checks his place of employment was determined. (T 428). The follow-up investigation revealed that the deceased had last been seen alive at Patty Johnson's home on the night of February 23, 1979. (T 435-443), and that he had left that night with the Appellant (T 443-444).

Appellant was subsequently arraigned and appointed counsel. Prior to trial, the defendant's attornies filed a twelve paragraph "Motion for Discovery" stating that it was made under authority of Brady v. Maryland, 373 U.S. 83 (83 SE 1194, 10 LE 2d 215) (1963) and its progeny , and under authority of Code Ann. Sections 38-801, 38-802. The motion specifically called for statements of Patty Johnson and described some items generally (e.g. memoranda or reports of law enforcement officers from Forsyth, Cobb, and Gwinnett Counties regarding the defendant and the case). The motion called for the production of these items at all pretrial hearings and at trial and asked that defense counsel be permitted to examine the documents or, if examination be denied, that the Court conduct an in camera inspection of such documents and that counsel be permitted to examine exculpatory materials found by the court in the in camera inspection.

On June 13, 1969, the defendant filed a motion to produce under Code Ann. 38-801, 38-802, detailing eight categories. This motion requested delivery of these itmes on the following day, June 14, 1979. At the June 14, 1979 hearing the trial judge

ordered the State to submit some of the requested material to the defense, and further ordered that the State submit their files to the court for in camera inspection.

At this hearing the defense specifically requested that the Court make a record of all the material reviewed so that any material not viewed by the defense could be preserved for appellate review. The State acquiesced to this request (Hearing Transcript, June 14, 1979, pp 31-32). This request was remade by defense on several occasions, the final time being at time of trial. (T 13).

Subsequent to the trial while on appeal to the Georgia Supreme Court the failure of the trial court to keep such a record of inspected material necessitated a de novo review by the Georgia Supreme Court of all material submitted for inspection. As a result of this review the Georgia Supreme Court did note "possible" exculpatory material, that being a conviction record of one of the State's witnesses (George Burns on four counts of dangerous drugs and bad checks). Parenthetically, this material had not been examined by the trial judge prior to trial. The Georgia Supreme Court concluded that such evidence, although possibly exculpatory, was not material either to the Appellant's guilt or punishment. (Georgia Supreme Court Case Number 35987, opinion dated June 10, 1980).

REASONS FOR GRANTING THE WRIT

1. Petitioner's conviction and sentence to death for murder and for possession of a deadly weapon during commission of a felony constitutes double jeopardy in violation of the Fifth Amendment to the United States Constitution.

Georgia Code Ann. Sections 26-505, 26-506 and 26-507 codify and expand the double jeopardy protection afforded criminal defendants by the United States and Georgia Constitutions. U.S. Const., Amend. V; Ga. Const., Art. I, Sec. I, Par. XV.

The notion that a person shall not be twice placed in jeopardy for the same offense includes two separate prohibitions: (1) An individual shall not be subjected to successive prosecutions for the same offense and (2) an individual shall not receive two punishments for the same offense.

The double jeopardy prohibition of multiple convictions is an aspect of the substantive criminal law. This substantive aspect has been described as "a limitation upon judicial interpretation of the substantive criminal law" which allows state legislatures freedom to define crimes and fix punishments, but restricts the courts from imposing more than one punishment for each offense. See, Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221 (1977).

The attempt to define whether a particular defendant is being punished twice for the "same offense" has occupied a great deal of judicial time. As a starting point, it has long been recognized that "separate statutory crimes need not be identical...in order to be the same within the meaning of the constitutional prohibition". Brown v. Ohio, supra, at 164.

Various types of tests have been developed to answer the question of whether the defendant is being twice punished for the same offense. The majority of courts follow the so called "required evidence" test defined by this court in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932) as follows:

> "...where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."
> 284 U.S. 299 at 304

Georgia's rule against multiple punishments is stated in Ga. Code Ann 26-506(a) which provides, as a general rule, that where the defendants conduct establishes the violation of more than one

statute he may be prosecuted for each crime. The statute also provides, however, that a defendant cannot be convicted of both (1) a greater and lesser included offense or (2) a general prohibition and a specific prohibition of the same conduct. Reference must then be made to Ga. Code Ann 26-505 to determine what a lesser included offense is.[1]

In the instant case, Petitioner was indicted, tried and convicted of Possession of a Deadly Weapon During Commission of a Felony. Ga. Code Ann. 26-9908a.[2] The instant case raises the question of whether convictions for both 26-9908(a) and the underlying felony can stand in light of the constitutional and Georgia Double Jeopardy provisions mentioned above.

The Georgia Supreme Court first raised this question in Roberts v. State, 228 Ga. 298, 185 S.E. 2d 385(1971), in which the defendant was convicted of armed robbery as well as 26-9908a. The latter conviction was based on possession of the gun which was used to commit the armed robbery. The court found the 26-9908a offense to be a lesser included offense of armed robbery, and therefore 26-506(a) barred such double conviction.

---

1 Code Ann.26-505 provides that a crime is included when: "(a) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged."

2 Code Ann. 26-9908a provides as follows: Any person who shall have on his person a firearm or a knife having a blade of three or more inches in length during the commission of, or the attempt to commit, any crime against or involving the person of another, the unlawful entry into a building or vehicle or a theft from a building or theft of a vehicle and which crime is a felony shall be guilty of a felony and, upon conviction thereof, shall be punished by confinement and labor in the penitentiary for a period of five years, such sentence to run consecutively to any other sentence which the person has received. Upon the second or subsequent conviction of a person under this section, such person shall be punished by confinement and labor in the penitentiary for a period of 10 years. Notwithstanding any other provision of law to the contrary, the sentence of any person imposed for violating the provisions of this section a second or subsequent time shall not be suspended by the court and probationary sentence imposed in lieu thereof. Notwithstanding any prior court decision to the contrary, any crime committed in violation of this section shall be considered a separate offense.

In Spence v. State, 233 Ga. 527,212 S.E. 2d 357(1975). The same court held that a similar rule would apply in the case of a murder committed with a firearm, but the issue was not squarely presented because the 26-9908a conviction had already been vacated after the verdict was rendered.

While the court did not explain itself fully in Roberts or Spence, it is apparent that it was taking a "same evidence" approach to the question of multiple convictions: There cannot be two convictions based on the same trial evidence.[3] See also, State v. Estevez, 232 Ga. 316, 206 S.E. 2d 475(1974); Whitehead v. State, 144 Ga. App. 836, 242 S.E. 2d 754(1978); Jackson v. State, 143 ga. App. 406, 238 S.E. 2d 752 (1977).

However, the most recent decisions of the Georgia Supreme Court concerning the interpretation of 26-506(a) indicate that this approach has been discarded in favor of a "distinct elements" approach. The apogee of the Roberts and Spence actual evidence approach was reached in Pryor v. State, 238 Ga. 698, 234 S.E. 2d 918(1977). In Pryor, the court was faced with a defendant convicted of both aggravated kidnapping and murder. The evidence showed that the defendant had shot the victim three times, with the third shot being fatal. While affirming the convictions for both offenses, the court hypothesized that if there had only been one shot, the aggravated kidnapping would be included within the murder "on the facts".

Faced with exactly this hypothesized situation in Potts v. State, 241 Ga. 67, 243 S.E. 2d 510(1978), the Georgia Supreme

---

[3] Apparently in response to Roberts and Spence, the Georgia General Assembly, in 1976, amended 26-9908a to provide that "notwithstanding any prior court decision to the contrary, any crime committed in violation of this section shall be considered a separate offense".

Court affirmed both convictions by adopting the Blockburger test and concluded that "[no] matter what may have been put into evidence, the key consideration is whether one of the crimes was established by proof of the same or less than all the facts required to establish the commission of the crime charged." Accord, Stephens v. Hopper, 241 Ga. 596, 247 S.E. 2d 92 (1978); Oglesby v. State, 243 Ga. 690, 256 S.E. 2d 371(1979).

Under this analysis, a defendant can be convicted of two offenses in the same transaction if, and only if, each of the offenses requires the state to prove an element that is not required to be proven for conviction of the other. Conversely, the defendant cannot be convicted of both crimes if the proof of one requires all the elements of the other plus other elements.

It is submitted that the Georgia Supreme Court's approach to this problem, with specific reference to Code Ann. 26-9908a, is faulty in the following respect. The Georgia Supreme Court, in finding that the 26-9908a conviction was the lesser included offense was obviously misled by the fact that the sentence for 9908a is less than that for most of the other underlying felonies. In point of fact, 26-9908a is the greater offense in this situation in that all the elements of the underlying felony must be proven in every 26-9908a prosecution plus the additional element of possession of the forbidden firearm. Under the Potts analysis, the underlying felony may change from case to case, but a 26-9908a offense cannot be proven without all the elements of some felony.

For purposes of the double conviction issue, 26-9908a is a perfect analogue to the felony/murder provisions of the Georgia Code. Code Ann 26-1101(b).[4] While any felony can serve

---

[4] Code Ann. 26-1101(b) provides: A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

as the underlying predicate of a felony-murder conviction, in any particular case the proof of felony/murder will necessarily require the proof of all elements of the underlying felony. The Supreme Court of Georgia has recognized this in repeatedly vacating the conviction for the underlying felony where the Defendant has also been convicted of felony-murder. See, e.g. Atkins v. Hopper, 234 Ga. 330, 216 S.E. 2d 89(1975); Woods v. State, 233 GA. 495, 212 s.E. 2d 322(1975).

Alternatively, under the "same evidence' test, the Double Jeopardy Clause of the United States Constitution would forbid conviction of both 26-9908a and the underlying felony. The Georgia Courts have not even referred to the applicability of the Clause in this situation. That clause has long beeen held applicable in situations where there have been convictions under two separate statues which,for constitional purposes are the "same offense".

Concededly, this Court has looked to legislative intent as an important factor in determining the validity of double convictions. Brown v. Ohio, supra; Gore v. United States, 357, U.S. 386, 78 S. Ct. 1280(1958). However, this "legislative deference approach" cannot be allowed to permit the legislature to define by itself the contours of the Double Jeopardy Clause of the United States Constitution. Absolute deference could obviously lead to absurd results. See, Schwartz, Multiple Prosecutions for the "same offense": Michigan Grapples with the Definitional Problem, 25 Wayne L. Rev. 825(1979).

In Simpson v. United States, 935 U.S. 682, 97 S. Ct. 2912 (1977), the Court wrote:

> "Cases in which the government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy...Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissable, it is necessary, following our practice of avoiding constitional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties..."

This passage mandates a two-step analysis: First, did the legislative body intend for the defendant to be liable for double punishment? It is clear from the 1976 amendment to 26-9908a that the Georgia General Assembly did so intend. Second, however, assuming a legislative intention to twice punish, does the constitution itself bar double conviction? In Simpson this Court was able to avoid the second step because of a perceived legislative intent not to punish twice. In the instant 26-9908a murder prosecution in Georgia, this cannot be avoided because of the clear legislative intent.

Brown v. Ohio, supra, indicated that the content of the Double Jeopardy Clause is itself the "distinct elements" test. Thus, in Brown, the Court held there could not be a conviction of both theft and joy riding because joy-riding had no element, under Ohio law, which would not have to be proven in a theft case. Similarly, in Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912 (1977), the Court held that Double Jeopardy prohibited the later prosecution for a felony after an earlier conviction of felony/murder based on that felony.

As stated above, the structure of 26-9908(a) is identical to that of felony/murder. If the Double Jeopardy Clause prohibits conviction of both the felony and the felony/murder, it must likewise prohibit conviction of both the felony and 26-9908a. Harris stands for the proposition that the Double Jeopardy Clause prohibits double conviction where the legislative body has defined an offense as consisting of the commission of one of a class of offenses plus an additional element. Section 26-9908a does precisely that. It is defined as the commission of one of a particular group of felonies plus the possession of a firearm or knife.

Finally, refusal to permit double conviction in these situations does not emasculate legislative intent. If the legislative intent is to punish certain felonies more severely when accompanied by certain types of weapons, it could easily provide for sentence enhancement by way of amendment to the

particular felony statutes involved or the passage of a general statute providing for automatic increase of sentence for any who are convicted of certain felonies while in possession of a firearm. In fact, sch a result could be reached by proper judicial interpretation of 26-9908a. See, Schwartz, supra, at pp. 853-58. It should be noted that the Georgia Legislature has already taken this course in several instances. See, e.g., Ga. Code Ann 26-1302(an aggravated assault made knowingly on a law enforcement official is punished more severly than other aggravated assaults).

2. Petitioner's conviction and sentence to death for murder while in the commission of kidnapping with bodily harm, where the asportation is a part of the commission of the crime of murder and the only bodily harm is the murder itself, violates due process of law as guaranteed by the Eight and Fourteenth Amendments to the United States Constitution.

Ga. Code Ann. 26-1311(a) provides:

> "A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will".

The Georgia view of asportation is "any unlawful asportation, however slight, is sufficient to show the 'taking' element". Craighead v. State, 126 Ga. App. 300, 190 S.E. 2d 606 (1973); Brown v. State, 132 Ga. App. 399, 208 S.E. 2d 183 (1974); Bailey v. State, 146 Ga. App. 774, 247 S.E. 2d 588(1978).

Further, Georgia refuses to adhere to the "merger" concept - that movements incident to the commission of another felony which do not substantially increase the risk of harm over and above the risk necessarily present in the felony, did not constitute the separate crime of kidnapping. See, Bailey v. State, supra, at 775-6 and citations therein.

Under this view, any murder becomes a capital murder if the victim is moved at all. Should the victim be ordered to move 5 feet over and turn around, then be shot and killed, this would justify a sentence of death under Ga. Code Ann 27-2534.1 (b)(2). What guidelines or standards are present to avoid the arbitary and capricious infliction of the death penalty any time the victim is moved at all? The language and interpretation of the statute is so broad as to allow capital punishment in any murder case. Gregg v. Georgia, 428 U.S. 153(1976).

Nothing in this section, and specifically with reference to kidnapping with bodily harm, channels the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance". See, Godfrey v. Georgia, 446 U.S.____, 100 S. Ct. 1759(1980). As was said in Godfrey, supra, "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not". Thus, the Georgia courts have adopted so ambiguous a construction of kidnapping with bodily harm in death cases that the realm of cases that is included is impermissibly large, leaving undue discretion to the sentencer and creating intolerable dangers of arbitariness and caprice.

What may be a defensible legal position in non-capital felony cases; becomes indefensible when applied to capital felony cases. In fact, the issue has been skirted in both Brown, supra; and Bailey, supra. In Bailey the Court refused to adopt the merger concept, and found no merit in the argument advanced by appellant that kidnapping was incidental to an escape. 146 Ga. App. at 779.

The evidence in the instant case clearly demonstrates that any kidnapping present here was in fact incidental to the commission of the crime of murder. There is no question of fact in that regard. Where movement is incidental to a murder there is always the presence of this aggravating circumstance.

In sum, the imposition of a death sentence on Petitioner for the crime of murder while in the course of the commission of kidnapping with bodily harm, where the asportation was incidental to the murder and the only harm was to the deceased, violates the standards of due process enunciated by this Court in Gregg, supra, and Godfrey v. Georgia, supra.

3. Petitioner was denied due process and protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution by the prosecutors continual comments upon Petitioner's failure to produce certain evidence.

Under Georgia law, although a prosecutor is prohibited from commenting on the defendants failure to testify (see, Griffin v. California, 380 U.S. 609(1965)); the prosecutor can argue to the jury inferences to be drawn from the defendant's failure to produce witnesses, who are competent to testify and allegedly would give evidence favorable to the defendant. See, Shirley v. State, 245 Ga. 616, 618, 266 S.E. 2d 218 (1980) and cits.

However a defendant is prohibited from drawing the same inferences from the failure of the prosecution to produce witnesses on its behalf. See, e.g. Brown v. State, 150 Ga. App. 831,832(2) 258 S.E. 2d 641(1979); Gannaway v. State, 142 Ga. App 87, 235 S.E. 2d 392(1977).

In the case sub judice the prosecutor argued as follows:

> "Now that (a man named Ron or Ronnie) has come up during the course of this trial several times. He hasn't testified in the case. But there is a defense investigator. If there was a Ronnie, don't you think he'd know where he was?...If there was such a person as a "Ronnie" they (defense) would have given you the name of that person. They would have found him".
> (T-1177)

> "Everyone of them there saw what happened. If then (sic) didn't, don't you know that the defense would have brought them in there?"
> (T-1176)

"Now I am going to ask you this, with their investigator and two attorneys. Couldn't they produce just one name of anybody else that fits "Joey" Wilson's description that drives a truck like that, a truck exactly like this truck?"

(T-1179)

Thus, throughout his final argument the prosecutor continually commented upon the defendants failure to produce evidence and witnesses in his behalf. Mere failure to call a witness who may have been around the defendant during the period prior to or subsequent to the crime; or even at the crime itself (Knox v. State, 112 Ga. 373(2), 37 S.E. 416), cannot raise a presumption against the accused that those persons would, if called, have testified unfavorably to him.

What is the basis under which Georgia law allows a prosecutor to argue inferences from the failure to testify, but not a defendant? A defendant need call no witnesses at all; and, the burden never shifts from the State to prove each and every element of a crime beyond a reasonable doubt. Surely a criminal defendant may draw inferences from the States failure to produce competent evidence at its disposal? This rule obviously flys in the face of justice as well as eroding the States burden of proof. No burden can be placed on the defendant during the trial of a criminal case. In this case, the witnesses were as available to the State as to the defendant, and the State could have called them to testify.

This procedural rule and the comments in this case deny Petitioner his rights to due process and equal protection of law.

4. Trial Court's instructions improperly place the burden of proof on the issue of intent upon the Petitioner rather than the State in violation of the Due Process Clause of the Fourteenth Amendment.

Ga. Code Ann. 26-1101 identifies two types of malice - the requisite mens rea for malice murder: express and implied. Of course, the intention to kill, like any other intention, is rarely capable of proof out of the mouth of the defendant or through specific prior acts connected to him or her. Therefore, Georgia provides in its murder statute and case authority that there can be a finding by the trier of fact of implied malice.

The exact meaning of this concept of "implied" malice is not clear, but apparently it is simply an intention to kill which is proven either by the act of killing itself, the surrounding circumstances or the absence of any provocation which would reduce an act otherwise murder to the level of voluntary manslaughter.

While the statute identifies two situations in which "implied" malice shall be found ("where no considerable provocation appears" and " abandoned and malignent heart"), the manner most frequently relied upon is the use of a deadly weapon. Georgia courts have traditionally held that when a defendant uses a deadly weapon to kill there is enough evidence to find the presence of malice. See, e.g. Chandle v. State, 230 Ga. 574 98 s.E. 2d 289 (1973); Ogletree v. State, 209 Ga. 413, 73 S.E. 2d 201(1952); Delk v. State, 135 Ga. 312, 69 S.E. 541(1910); Moon v. State, 68 Ga. 687 (1882). The method by which this is usually expressed is a two-step analysis which states that: (1) Upon a showing of the use of a deadly weapon the law presumes intent and (2) The law presumes every intentional homicide to be malicious. Patterson v. State, 239 Ga. 409, 238 S.E. 2d 2(1977).

In the case sub judice, the trial court charged the jury as follows:

> "If a person is killed by another, by an instrument, in the manner in which it was used was one likely to produce death, and at the time of the killing there were no circumstances such as to excite the fears of a reasonable man that he was in danger from the deceased, then the law will imply malice on the part of the defendant, and you would be authorized to find him guilty of murder, as charged in the indictment".
> (T-1195)

Further the Court charged

> "Intent may be inferred from proven circumstances, or, as I have said, by acts, conduct, demeanor and motive, or it may be presumed, when it is the natural and necessary consequences of the act for which the defendant is being prosecuted."
>
> (T-1198-9)

In Patterson, supra, the defendant claimed that presenting the jury with the instructions that "the law presumes the intent to kill" from the use of a deadly weapon and "the law presumes every intentional homicide to be malicious until the contrary is established" constituted an unconstitutional shift of the burden of proof as well as an unconstitutional set of presumptions for failure to establish a rational connection between proven and presumed fact.

While the Georgia Supreme Court recognized that malice is the mens rea element of murder and United State Supreme Court authority forbids the placing of the burden of proof on the defendant with regard to an element of the offense (Patterson v. New York, 432 U.S. 197; Mullaney v. Wilbur, 421 U.S. 684), the Georgia Court held that the above-quoted charges did not unconstitutionally place the burden of proof on the defendant. See also, Spain v. State, 243/15, 252 S.E. 2d 436(1979); Thomas v. State, 240/454, 241 S.E. 2d 204 (1976).

It must be noted that the charge in the case sub judice made no mention of the rebuttable nature of any presumption found in the law. In this respect, the instant case presents a stronger case than that found in Patterson, supra. Indeed, the decision of this Court in Sandstrom v. Montana, 441 U.S.____, 19 S.Ct____ (1979) overrules Patterson on its facts. The Montana Supreme Court, in Sandstrom, had reasoned exactly as the Georgia Supreme Court in Patterson, supra: That the effect of the instruction was to shift the burden of production of evidence only. In Sandstrom, this Court held that a trial court instruction almost identical to that in Patterson, to the effect that "the law presumes that a person intends the ordinary consequences of his voluntary acts", was unconstitutional in that it violated the Fourteenth Amendments requirements that the State prove every element of a criminal

offense beyond a reasonable doubt. Sandstrom held that regardless of what the Montana Supreme Court held was the actual legal effect of such a presumption (or, by analogy, The Georgia Supreme Court), a reasonable juror when told that "the law presumes" could have interpreted the instruction as creating either a conclusive presumption or at least a burden-shifting one and either such interpretation is unconstitutional in a criminal case. Under Sandstrom therefore, it seems clear that the malice instruction give sub judice is subject to the same constitutional infirmity.

Sandstrom mandates great caution in the instruction of juries with regard to the deadly weapon doctrine. Surely even greater caution is mandated in a death penalty case. Clearly, the jury must be instructed that any "presumption" or implication is not conclusive and can be rebutted. Cf. Hill v. State,244/86, 259 S.E. 2d 41 (1979).

The instruction in the instant case therefore violates Petitioner's rights under the Fourteenth Amendment to the United States Constitution.

5. The Georgia Supreme Court erred in making a determination of immaterality under Brady (infra) as to a conviction record of one of the State's witnesses, thereby denying Petitioner of his due process rights of equal protection, of his right to a fair and impartial trial, and his right to confront witnesses.

If the trial court had refused to allow the Petitioner's attorney to cross examine a State's witness as to his prior conviction on four counts of dangerous drugs, and bad check such refusal would clearly be error under Ga. Code Ann 38-1804. Yet, by the failure of the State to reveal this information before trial, the apparent decision of the trial court that it was not exculpatory or immaterial, and the subsequent decision by the

Georgia Supreme Court that this information was immaterial all effectively combines to deny the Petitioner his rights under this Georgia Code Section.

In Giles v. Maryland, 386 U.S. 66, 74, this Court stated that the State has the duty to disclose any favorable evidence which could be used at trial..." or in obtaining further evidence." (emphasis added).

In the instant case the Petitioner made an extensive, specific, pre-trial motion for discovery, under the authority of Brady v. Maryland, 373 U.S. 83 (1963),and also requested an in camera inspection of any and all documents by the trial court, and further requested that a record be made.

No such record was made so that Petitioner cannot be sure of the basis of the trial court determinations, yet it is apparent that there was a finding of its being either immaterial or non-exculpatory. The Supreme Court of Georgia concluded that this information was immaterial.

Yet, the lower federal courts have recognized the obvious value to an accused of this type of information. In Williams v. Dutton,400 F 2d 797(5th Cir., 1978), the Court reasoned that evidence which may serve to impeach the testimony of a Government witness is discoverable under Brady, supra, because the duty of disclosure upon the State applies to any information, "favorable to the accused either as direct or impeaching evidence." See also, United States v. Keogh, 391 F 2d 138(2nd Cir., 1968); Guerrero v. Beto, 384 F 2d 886 (5th Cir., 1968); Powell v. Wiman, 287 F 2d 275 (5th Cir., 1961) (mental instability on part of key prosecution witness); In Re Ferguson, 489 F 2d. 1234 (9th Cir., 1971).

Further, the Supreme Court's determination of immateriality in this case has also denied Petitioner of his right to a fair trial, and to his right to cross examine witnesses. The fact that the Supreme Court of Georgia acknowledges the potential exculpatory nature of the undisclosed material should, because that material is admissable under the Georgia Rules of Evidence, lead to a finding of materiality. Otherwise, the rule would soon be guted by Appellate Courts, attempting to make a deter-

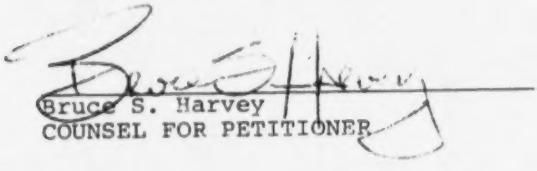
mination as to the weight of the evidence, a determination that has long been reserved as the exclusive province of the jury.

In short, there is no meaningful way, at this point in time, to measure the affect that the undisclosed information may have had upon the minds of the jurors at trial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,



Bruce S. Harvey
COUNSEL FOR PETITIONER

P.O. Box 906
Clayton, Georgia 30525
Phone: (404) 782-4575

Supreme Court of the United States

No. A-223

JOSEPH WILSON, JR.,

Petitioner,

v.

GEORGIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 21, 1980.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 10th
day of September, 19 80.

3.60

In the Supreme Court of Georgia

Decided: JUN 10 1980

35987. JOSEPH WILSON, JR. v. STATE.

HILL, Justice.

This is a death case. From the presentation of the evidence the jury was authorized to find the following: The defendant, Joseph Wilson, Jr., and the victim, George A. Knox, and the victim's girl friend, Patty Johnson, were involved one to another or all together in some sort of drug deal.

On the evening of February 23, 1979, the defendant told two witnesses that he was going to blow the victim away. At about 9:45 p.m. that night the defendant abducted the victim at gunpoint from Patty Johnson's house in Cobb County. The victim was in the house with Ms. Johnson and two of his friends when the defendant entered the house carrying a 12-gauge, sawed-off shotgun. He pointed the gun at the victim and said something to the effect that "You set me up", or "You put the heat on me." The victim denied the allegation. The two friends, David and Kenneth Burns, attempted to leave but the defendant pointed the shotgun at them. After being assured that these two knew nothing, the defendant permitted them to go. The defendant again pointed the shotgun at the victim and said, "Let's go." The victim attempted to take his jacket and a chain that he carried, allegedly for protection, but was told he wouldn't need them. The defendant and the victim left the house in the defendant's truck. The Burns brothers saw them come out of the house. Later that night the defendant talked with Ms. Johnson over the telephone and told her that the victim had been "taken care of." The defendant told her to get rid of the victim's jacket.

The victim's body was found the next morning in a field in Forsyth County. He had been shot by a 12-gauge shotgun blast between the eyes at close range. The evidence at the scene indicated that the body was found where the shooting occurred. A neighbor testified that she heard a shot at about 1 a.m. There were no other wounds on the body. The defendant was subsequently arrested, indicted, tried, and based primarily upon the testimony of Patty Johnson, David and Kenneth Burns and the investigating officers, was convicted of the murder of George A. Knox, the kidnapping with bodily injury of George A. Knox, and possession of a firearm during the commission of a crime. He was sentenced to death for the murder based on the statutory aggravating circumstance found by the jury, kidnapping with bodily injury to the victim. He was also sentenced to life imprisonment for kidnapping with bodily injury and to five years for possession of the firearm.[1/] The evidence was sufficient to convince a rational trier of fact of defendant's guilt beyond a reasonable doubt. Jackson v. Virginia, ____U.S.____ (99 SC 2781, ____LE2d ____)(1979).

Prior to trial, the defendant filed a 12 paragraph "Motion for Discovery" stating that it was made under authority of Brady v. Maryland, 373 U.S. 83 (83 SC 1194, 10 LE2d 215) (1963), and other cited cases, and under authority of Code Ann. §§ 38-801, 38-802. This motion called for some items particularly (e.g., statement of Patty Johnson) and described some items generally (e.g., memoranda or reports of law enforcement officers from Forsyth, Cobb and Gwinnett Counties regarding the defendant

---

/1/ At the guilt-innocence trial the defendant sought to establish that he was at home with his wife on the night of the murder. At the sentencing trial he admitted that Ms. Johnson had testified truthfully as to his taking the victim from her house and testified that the victim was abducted from him by two men after he and the victim left the Johnson home.

and the case). The motion called for the production of these items at all pretrial hearings and at trial and asked that defense counsel be permitted to examine the documents or, if examination be denied, that the court conduct an in camera inspection of such documents and that counsel be permitted to examine exculpatory materials found by the court in the in camera inspection. 2/

On June 13, 1978, the defendant filed a notice to produce calling for production pursuant to Code Ann. §§ 38-801, 38-802 of eight categories of specifically described items (some of which were listed in the earlier "Motion for Discovery") at a pretrial hearing set for the following day. Following that hearing, the court entered an order requiring the state to submit much of the requested material to the defendant for examination and requiring the district attorney and Forsyth County sheriff to submit their files to the court for an in camera inspection looking for exculpatory materials. The trial judge conducted the in camera inspection and initialed in red ink the materials he reviewed.

After the defendant examined the statements of Patty Johnson and David and Kenneth Burns, the defendant filed another notice to produce seeking to require the state to produce copies of those statements at any pretrial hearing and at trial.

1. The defendant has enumerated three alleged errors on the guilt-innocence phase of the trial. Two of these enumerations, with subparts, deal with the production of documents. In substance defendant complains that the trial court erred (1) in failing to provide the defendant with exculpatory material found during the in camera inspection, (2) in failing to find that the statements of Patty Johnson and David and Kenneth Burns were

---

/2/ For the reasons which appear below, we do not approve of the practice of combining in one motion items sought by notice to produce with items sought pursuant to Brady v. Maryland, supra.

exculpatory, (3) in failing to furnish copies of the statements of Patty Johnson and David and Kenneth Burns to defendant's counsel, and (4) in failing to make a record or inventory of the materials the court examined in camera or to require that they be deposited in the registry of the court, thereby depriving the defendant of the right of appellate review of the in camera inspection.[3/]

In Brown v. State, 238 Ga. 98, 101 (231 SE2d 65) (1976), this court held that, pursuant to Code Ann. § 38-802, the notice to produce provisions of Code Ann. § 38-801(g) are applicable in criminal cases. As was pointed out in Brown, 238 Ga. at 100, sections 38-801 and 38-802 of our Code are unrelated to disclosure of exculpatory materials pursuant to Brady v. Maryland, supra.

Notices to produce under Code Ann. § 38-801(g) can be used in a criminal case "to compel production of books, writing or other documents or tangible things in the possession, custody or control" of the opposite party, the State (district attorney and investigating officers),[4/] for use at trial, or at a pretrial evidentiary hearing, where such books, etc., would be admissible and are needed for use as evidence on behalf of the defendant.[5/] Natson v. State, 242 Ga. 618 (5) (250 SE2d 420) (1978). Such a notice to produce may be quashed or modified if it is unreasonable or oppressive. Code Ann. § 38-801(b). A notice to produce cannot be used to enable defense counsel to examine, in advance of trial or evidentiary hearing, the contents of the district

---

/3/ This case was tried before enactment of the 1980 act providing for discovery of the defendant's confession or statements made in police custody and for discovery of scientific reports to be used by the state (e.g., crime lab reports, autopsy reports, blood alcohol test reports). Ga. L. 1980, p. ____ [H.B. No. 672, Act No. 1333].

/4/ A separate subpoena duces tecum directed to the investigating officers may be necessary. See Booker v. State, 242 Ga. 773 (1) (251 SE2d 518) (1979).

/5/ A notice to produce in a criminal case under Code Ann. § 38-801(g) is not as all inclusive as a request to produce discoverable evidence under our Civil Practice Act, Code Ann. §§ 81A-134(a), 81A-126(b).

attorney's file. Natson v. State, supra. As was held in Natson, a notice to produce cannot be used in a criminal case to require the production of the district attorney's work product; reports, memoranda and documents in the files of law enforcement officers; addresses and telephone numbers of the state's witnesses; or the names and addresses of other persons with knowledge of the facts.[6] As was pointed out in Stevens v. State, 242 Ga. 34 (1) (247 SE2d 838) (1978), witness statements are not subject to notice to produce, although exculpatory witness statements are subject to disclosure under Brady v. Maryland, supra. Accord: Hamby v. State, 243 Ga. 339 (2) (253 SE2d 759) (1979); Spain v. State, 243 Ga. 15 (2) (252 SE2d 436) (1979).

Brady v. Maryland, supra, requires that, on motion for production of specific material, the defendant be furnished exculpatory information; i.e., information favorable to the defendant and material either to guilt or punishment.[7] Where a Brady motion is made and the prosecutor does not make the specified material available to defense counsel, the trial judge should make an in camera inspection of the material sought. Payne v. State, 233 Ga. 294, 296 (210 SE2d 775) (1974); Fleming v. State, 236 Ga. 434, 438 (224 SE2d 15) (1976); Watts v. State, 239 Ga. 725, 727 (238 SE2d 894) (1977). On motion by the defendant the material examined in camera should either be sealed and filed, Durham v. State, 239 Ga. 697 (3b) (238 SE2d 334) (1977); or an inventory or record of the examined material made, so as to permit appellate review, Dickey v. State, 240 Ga. 634, 637, fn. 1 (242 SE2d 55) (1978).[8] Once the material is sealed or inventoried by the trial court, the appellate court can, upon the defendant's showing cause, exercise its discretion and call for the examined material.

/6/ The names of the state's witnesses are obtainable under Code § 27-1403.

/7/ The United States Supreme Court has held that a prosecutor is under a duty to furnish the defendant, without request, material which creates a reasonable doubt as to the defendant's guilt. United States v. Agurs, 427 U. S. 97 (SC , LE2d) (1975).

/8/ As can be seen from the above discussion, the in camera inspection looking for possibly exculpatory material is one of the progeny of Brady v. Maryland, supra. A notice to produce does not result in an in camera inspection.

In the case before us the defendant moved that the examined materials be sealed and filed for appellate review and we have ordered that those materials which the trial judge examined in camera be sealed and transmitted to this court under certificate of the judge as to whether the file contains all the materials examined by him. The trial judge had initialed the materials he examined and he has certified that to the best of his knowledge and belief those materials he examined, excluding any admitted into evidence during the trial, have now been transmitted to this court, together with other materials later placed in the files. In addition, the trial judge's certificate is supported by affidavits of the prosecuting attorney and the investigating officer. Subpart four (4) of defendant's enumeration of error, above (failure to make a record of the examined materials so as to permit appellate review), has been rendered moot.[9/]

We have examined the material furnished to us and find no exculpatory material, with one possible exception (not examined by the trial judge prior to trial). A Georgia Crime Information Center report reflects that one David Burns was convicted on four counts of dangerous drugs and bad check and was given three months probation and required to pay $36 in restitution. Such information was called for by defendant's motion for discovery. However, in view of the corroboration of witness David Burns' testimony by Kenneth Burns and Patty Johnson, as well as the subsequent corroboration of the testimony of Patty Johnson by the defendant, we find that this information was not material either to defendant's guilt or punishment. Brady v. Maryland,

---

/9/ Owens v. State, 233 Ga. 869 (214 SE2d 173) (1975), is not applicable here. That case involved the post trial recreation of testimony of potential jurors whereas this case involves the transmission of files containing written documents.

supra. Hence, subpart one (1) of defendant's enumeration of error, above, is not grounds for reversal.

Whether or not the statements of Patty Johnson and David and Kenneth Burns were exculpatory is immaterial; they were made available to the defendant. Thereafter it was not the responsibility of the court to determine if those statements were exculpatory. It was not error to refuse to make copies of those statements for defense counsel where counsel saw those statements in advance of trial and had them available for use at trial. Subparts two (2) and three (3) of defendant's enumeration of error, above, are not grounds for reversal.

2. In his final enumeration defendant asserts error in the admission of testimony by the investigating officer as to out-of-court conversations that he had with certain witnesses. The victim's driver's license and a payroll check were found on his body. Through the employer, an address for the victim was obtained. The house had burned. Patty Johnson, who lived next door, was interviewed to find out where the occupants of the burned house had moved. The officer testified on direct examination that he learned from Patty Johnson the names of the people who had been living next door with the victim until the fire. Patty Johnson told the officer during this interview that she last saw the victim on the afternoon before the murder. He testified that he located and interviewed the former neighbors. At this point the defense objected to any testimony concerning conversations, but the trial court allowed the testimony to explain the officer's conduct of the investigation. See Code § 38-302. The officer said that information he received from the victim's former housemates led him back to Patty Johnson. The defendant asserts that after this information was given, it was error for the prosecutor to ask, "How did you determine

that, or why did you go back to Patty Johnson's after talking with these people?" This question elecited testimony from the officer that he learned the name "Joey Wilson" from the victim's former housemates and information which indicated that Patty may have seen the victim later than she had admitted. This had led him back to Patty Johnson.

Defendant asserts that the state's purpose was to put before the jury the exact words of an out-of-court declaration and that the suspicion that Patty Johnson had misstated the time she last saw the victim was prejudicial. No exact words were repeated. The testimony of the officer merely showed why he returned to talk with Patty Johnson. Patty Johnson later testified that the victim had been at her house at about 9:45 p.m. on the evening in question. The former neighbors later testified that the defendant had told them he was going to blow the victim away. Any error in admitting the officer's testimony for the limited purpose of explaining his conduct was rendered utterly harmless by the subsequent admission of the testimony of the witnesses referred to by the officer. Mooney v. State, 243 Ga. 373 (5) (254 SE2d 337) (1979); Arnold v. State, 236 Ga. 534 (5) (224 SE2d 386) (1976).

3. Sentence Review. (A) Code Ann. § 27-2537 requires this court to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." One prospective juror was stricken for cause under Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968). The transcript of voir dire shows that this juror was properly disqualified.

In his closing argument in the sentencing phase, the prosecutor began by addressing his remarks to the trial court with the jury present. He argued four points in favor of imposing

the death penalty (retribution, deterrence, protection of society by removal, and rehabilitation). The prosecutor quoted Gregg v. Georgia, 428 U.S. 153, 183-184 (96 SC 2909, 49 LE2d 859) (1976), on the retribution theory justifying the imposition of the death penalty. He argued the tendency of the defendant to escape, as evidenced by his past record, and noted that the Alday murderers were escapees. [See Coleman v. State, 237 Ga. 84, 96 (226 SE2d 911) (1976).] Regarding protection of society, he read to the trial court from Eberhart v. State, 47 Ga. 598, 610 (1873), attributing the remark to "a noted legal scholar of the 1800's." The prosecutor next addressed his remarks specifically to the jury, referring back to his earlier argument and also quoting the state's argument to the United States Supreme Court in Gregg v. Georgia, supra, in reference to deterrence and protection of society.

We have condemned the practice of quoting from Eberhart v. State, supra. Hardy v State, 245 Ga. 272, 279 (SE2d) (1980); Hawes v. State, 240 Ga. 327, 335-336 (240 SE2d 833) (1977). The practice of quoting nevertheless has continued. Each case must be decided upon its own facts as to the question of passion, prejudice, etc. Ruffin v. State, 243 Ga. 95, 105 (252 SE2d 472) (1979). We will continue to review each case on that basis, giving particular scrutiny to quotations read in the presence of the jury. Reading the prosecutor's closing argument as a whole in this case we find that except for the extraneous and unnecessary reference to the Alday murders, he used the quotations referred to above in making a rational argument to the jury for imposition of the penalty of death, he did not make it appear that the judiciary approved imposition of the death penalty in this case, and we do not find that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor.

the murder was committed while the offender was engaged in the capital felony of kidnapping with bodily injury. Code Ann. §§ 27-2537(c)(2); 27-2534.1(b)(2). There was no evidence of bodily injury to the victim other than the shot which caused his death. Although the defendant in this case received only a life sentence for the offense of kidnapping with bodily injury, where the victim of the kidnapping is killed kidnapping with bodily injury is a capital felony for purposes of our statutory aggravating circumstances. Peck v. State, 239 Ga. 422, 431-432 (238 SE2d 12) (1977). This court has held that kidnapping with bodily injury and murder are not included crimes as a matter of law or fact and that where a kidnap victim is murdered the aggravating circumstance of kidnapping with bodily injury is supported by the evidence. Pryor v. State, 238 Ga. 698, 701, 703 (234 SE2d 918) (1977), Potts v. State, 241 Ga. 67, 86-87 (243 SE2d 510) (1978); Stephens v. Hopper, 241 Ga. 596, 600 (247 SE2d 92) (1978). The evidence supports the jury's finding of kidnapping with bodily injury beyond a reasonable doubt (see the statement of the facts of this case, above).[10/]

/10/ Because the aggravating circumstance found by the jury was that the offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping with bodily injury (a crime as to which the jury had found the defendant guilty), Code Ann. § 27-2534.1(b)(2), the decision in Godfrey v. Georgia ____ U. S. ____ (No. 78-6899 decided May 19, 1980) is not involved here. As the United States Supreme Court noted in Godfrey, supra (opinion of the Court, fn. 2), ground (2) of Code Ann. § 27-2534.1(b) is more specific and objectively measurable than ground (7).

(C) In reviewing the sentence of death, we must determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the similar cases listed in the appendix support affirmance of the death penalty for murder. The cases show that juries are not unwilling to impose the penalty of death for murder where the victim has been kidnapped and deliberately put to death.

The evidence shows that the defendant, carrying a shotgun, sought out the victim intending to kill him, that he transported the victim at gunpoint to a secluded spot at night, and that he deliberately murdered the victim by shooting him between the eyes with the shotgun at close range. The sentence of death imposed upon Joseph Wilson, Jr., is not excessive or disproportionate considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

35987. WILSON v. STATE

APPENDIX

1. Pryor v. State, 238 Ga. 698 (234 SE2d 918) (1976)
2. Morgan v. State, 241 Ga. 485 (246 SE2d 198) (1978)
3. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)
4. Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979)
5. Hardy v. State, 245 Ga. 272 (SE2d) (1980)
6. Dampier v. State, 245 Ga. 427 (SE2d) (1980)